

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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**Appeal Nos. 2012AP781
2013AP927**

Cir. Ct. No. 2010CV212

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 2012AP781

**TED RITTER AND CAROLYN RITTER D/B/A RITTER ENTERPRISES,
INC.,**

PLAINTIFFS-RESPONDENTS,

V.

**TONY FARROW AND ARLYCE FARROW D/B/A FARROW ENTERPRISES,
INC.,**

DEFENDANTS-RESPONDENTS,

BIBS RESORT CONDOMINIUM, INC.,

PROPOSED-INTERVENOR-APPELLANT.

NO. 2013AP927

**TED RITTER AND CAROL RITTER, D/B/A RITTER ENTERPRISES,
INC.,**

**PLAINTIFFS-APPELLANTS,
V.**

**TONY FARROW AND ARLYCE FARROW, D/B/A FARROW
ENTERPRISES, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Vilas County: LEON D. STENZ, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. This case stems from a dispute between Ted and Carolyn Ritter, d/b/a Ritter Enterprises, (Ritters) and Tony and Arlyce Farrow, d/b/a Farrow Enterprises, (Farrows) over use of the name “Bibs Resort.” A jury found that Farrows’ use of the name “Bibs Resort” constituted a trade name, and Ritters infringed on that trade name. The circuit court entered a judgment awarding Farrows compensatory damages and \$25,000 in attorney fees.

¶2 On appeal, Ritters argue the circuit court erred by denying their motion to require joinder of Bibs Resort Condominium, Inc., (the Association) and the individual condominium unit owners. Similarly, the Association argues the court erroneously denied its motion to intervene. We agree that the court erred by denying the motions for joinder and intervention. We also agree with Ritters that

Farrows were not entitled to recover attorney fees on their trade name claim. We therefore reverse the judgment in favor of Farrows and the order denying the motion for intervention, and we remand for further proceedings on Farrows' trade name claim.

BACKGROUND

¶3 In 1986, Ritters purchased a lakefront resort in St. Germain, Wisconsin, and named it "Bibs Resort." They used a pair of red bib overalls with a handkerchief sticking out of the right pocket as a logo. The resort consisted of eleven cabins that Ritters rented to the public, one house in which Ritters lived, and a building used as a public bar and game room.

¶4 In 1998, Ritters converted the resort to a condominium, using the name "Bibs Resort Condominium." The condominium consisted of thirteen units—one for each of the cabins, one for the house, and one for the bar building. In May 1998, the Association was created to serve as the unit owners' association for the condominium.

¶5 After the resort was converted to a condominium, Ritters continued to manage the property and rent the eleven cabins to the public. Between 1998 and 2005, Ritters sold four of the cabin units. Ritters continued to rent all eleven cabins, pursuant to rental management agreements with the owners of the four units they had sold.

¶6 In June 2006, Ritters sold condominium units 12 and 13—the house and the bar building—to Farrows. The parties' intent was that Farrows would take over management of the resort. To that end, Farrows entered into rental management agreements with the owners of each of the cabin units, including

Ritters. Ritters and Farrows apparently agreed Farrows would continue operating the business under the name “Bibs Resort.”

¶7 The relationship between Ritters and Farrows subsequently deteriorated. In 2008, Ritters cancelled their rental management agreement with Farrows. Thereafter, the remaining unit owners also terminated their rental management agreements with Farrows. Ritters resumed renting the cabins themselves, at first using the name “The Cottages at Bibs Resort,” and later using the name “Bibs Cottages.”

¶8 In June 2010, Ritters filed the instant lawsuit against Farrows in small claims court, asserting various claims not relevant to this appeal. In response, Farrows asserted counterclaims for breach of contract, intentional interference with contractual relationships, intentional interference with prospective contractual relationships, breach of the duty of good faith and fair dealing, statutory trademark infringement, common law trade name infringement, unjust enrichment, and civil conspiracy. Because Farrows alleged damages in excess of \$10,000, the case proceeded under WIS. STAT. chs. 801 to 847. *See* WIS. STAT. §§ 799.01(1)(d), 799.02(1).¹

¶9 Farrows subsequently moved for a temporary injunction barring Ritters from using the name “Bibs.” They argued Ritters had sold them the trade name “Bibs Resort,” and Ritters’ continued use of the name “Bibs” in connection with their cabin rental business was confusing to potential customers. Ritters responded that they did not sell Farrows the trade name “Bibs Resort,” and any

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

evidence to the contrary merely showed a “grant to ... Farrows of a non-exclusive license to use the name[.]” Ritters also argued the name “Bibs” “legally belong[ed] to [the Association], and [was] available for all unit owners to use.” The circuit court rejected these arguments and granted Farrows’ motion for a temporary injunction. The injunction prohibited Ritters “or anyone on their behalf from using the trademark and trade name ‘Bibs’ or similar name, in any advertisement, solicitation, correspondence, website, business enterprise or otherwise.”

¶10 After the temporary injunction was issued, Ritters began renting their cabins under the name “Ritter Cottage Rentals, located at BIBS Resort Condominium[.]” Farrows moved to hold Ritters in contempt for violating the temporary injunction. Ritters responded that their reference to “Bibs Resort Condominium” was “solely for the purpose of providing information as to the location of the cottages they [were renting].” The circuit court rejected Ritters’ argument and found them in contempt.

¶11 On September 1, 2011, Farrows moved for summary judgment on their statutory trademark and common law trade name claims. Ritters opposed the motion, arguing, in part, that the name “Bibs Resort” was owned by the Association. Ritters also filed a cross-motion for summary judgment on the trademark and trade name claims. The circuit court held a hearing on the parties’ motions on November 11, 2011. At the close of the hearing, the court denied both motions, concluding genuine issues of material fact precluded summary judgment. The court refused to consider Ritters’ argument that the Association owned the name “Bibs Resort,” noting the Association was not a party to the case.

¶12 On December 5, 2011, the Association moved to intervene, pursuant to WIS. STAT. § 803.09(1). On December 7, Ritters moved the court for an order requiring joinder of the Association and the owners of the other condominium units, pursuant to WIS. STAT. § 803.03(1)(b)1. The circuit court denied both motions following a hearing.

¶13 Ritters subsequently agreed to dismissal of their claims against Farrows, and the case proceeded to trial on Farrows' counterclaims. On January 6, 2012, the jury returned a special verdict finding that: (1) Farrows established their use of the name "Bibs Resort" was a trade name; (2) Ritters' use of the names "Bibs Cottages" and "The Cottages at Bibs Resort" infringed on Farrows' trade name; and (3) the infringement damaged Farrows. The jury also found that Ritters intentionally interfered with Farrows' contractual relationships with the other condominium unit owners. The jury awarded Farrows a lump sum of \$60,000 in compensatory damages for both claims.²

¶14 Following trial, Farrows moved for a permanent injunction preventing Ritters from infringing on the trade name "Bibs Resort." Farrows also argued they were entitled to attorney fees on their trade name claim, pursuant to either WIS. STAT. § 132.033(2)(d) or the common law exception to the American Rule set forth in *Weinhagen v. Hayes*, 179 Wis. 62, 65, 190 N.W. 1002 (1922). In a decision issued January 4, 2013, the circuit court declined Farrows' request for a permanent injunction, reasoning that any future infringement could be adequately compensated by damages. The court also concluded the *Weinhagen* exception to

² The jury found that Ritters did not breach their sales contract with Farrows or their duty of good faith and fair dealing. In addition, the jury declined to award Farrows punitive damages.

the American Rule did not apply. However, the court agreed that Farrows were entitled to attorney fees under § 132.033(2)(d). It further concluded an attorney fee award of \$25,000 was reasonable under the circumstances.

¶15 Ritters now appeal the circuit court's judgment in favor of Farrows as to the trade name claim and attorney fees, and the Association appeals the order denying its motion to intervene.³

DISCUSSION

I. Joinder/Intervention

¶16 The same analysis that governs a motion to intervene under WIS. STAT. § 803.09(1) also applies to a motion for joinder of necessary parties under WIS. STAT. § 803.03(1)(b)1. *See Helgeland v. Wisconsin Muns.*, 2008 WI 9, ¶¶129-37, 307 Wis. 2d 1, 745 N.W.2d 1. If a person has no right of intervention under § 803.09(1), the court has no duty to join that person as a necessary party under § 803.03(1)(b)1. *Helgeland*, 307 Wis. 2d 1, ¶137. We therefore address Ritters' motion for joinder and the Association's motion for intervention together in a single discussion.

¶17 A movant seeking to intervene in an action must meet four requirements. *Id.*, ¶38. The movant must show that: (1) the motion to intervene is timely; (2) the movant has an interest sufficiently related to the subject of the action; (3) disposition of the action may impair the movant's ability to protect its interest; and (4) the existing parties do not adequately represent the movant's

³ We granted Farrows' motion to consolidate these appeals on January 3, 2014.

interest. *Id.*; *see also* WIS. STAT. § 803.09(1). While the movant must satisfy each of these criteria to claim a right of intervention, the criteria “need not be analyzed in isolation from one another, and a movant’s strong showing with respect to one requirement may contribute to the movant’s ability to meet other requirements as well.” *Helgeland*, 307 Wis. 2d 1, ¶39 (footnote omitted). “The analysis is holistic, flexible, and highly fact-specific.” *Id.*, ¶40 (footnote omitted).

¶18 Whether to allow intervention is a question of law that we decide independently of the circuit court, but benefitting from its analysis. *Id.*, ¶41; *see also Glaeske v. Shaw*, 2003 WI App 71, ¶44, 261 Wis. 2d 549, 661 N.W.2d 420 (whether a party is a necessary party under WIS. STAT. § 803.03(1) is a question of law that we review independently). Here, the circuit court found that Ritters and the Association failed to meet each of the *Helgeland* requirements. We disagree and conclude the court erred by denying Ritters’ motion for joinder and the Association’s motion to intervene.

A. Timeliness

¶19 *Helgeland* first directs courts to consider whether a motion to intervene is timely. *Helgeland*, 307 Wis. 2d 1, ¶38. The timeliness of a motion to intervene is committed to the circuit court’s discretion. *Id.*, ¶42. A circuit court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 415, 320 N.W.2d 175 (1982). When determining the timeliness of a motion to intervene, “[r]elevant factors include whether the movant acted promptly and whether the movant’s delay in bringing the motion ... will prejudice the existing parties to the case.” *Glaeske*, 261 Wis. 2d 549, ¶46.

¶20 The circuit court concluded Ritters and the Association did not act promptly because their motions for joinder and intervention were filed on the eve of trial, after the case had already “dr[agg]ed on so far[.]” The court also noted Ritters, who owned over fifty percent of the condominium units, were “aware of this matter since its inception.” Thus, the court reasoned Ritters “knew all the facts necessary to decide whether or not intervention on behalf of the condominium was appropriate.” In addition, the court found that granting the motions for joinder and intervention so close to trial would prejudice the existing parties.

¶21 We conclude the circuit court erroneously exercised its discretion. With respect to the first timeliness factor—promptness—we acknowledge the motions for joinder and intervention were filed over seventeen months after Farrows filed their counterclaims for trademark and trade name infringement, and slightly less than one month before trial was scheduled to start. However, during the hearing on the motions for joinder and intervention, the Association’s attorney, John Danner, explained the reasons for the delay. Danner stated the Association’s board of directors first contacted him regarding Farrows’ claims in June 2011. At that time, both Ritters and Arlyce Farrow were members of the board of directors. Danner explained, “[T]hose parties ... couldn’t come to an agreement as to when and how the board of director[s], if at all, should be involved in this lawsuit.” Consequently, Danner told the board he could not represent the Association as long as either Ritters or Farrows were directors.

¶22 Danner further stated that all the parties to this action were removed as directors by September 2011, at which point the board voted to retain Danner to represent it in connection with the trade name dispute. Shortly thereafter, Danner communicated with Farrows’ and Ritters’ attorneys, asking whether they “were

attempting ... to limit ... or otherwise obviate” the Association’s right to use the name “Bibs Resort Condominium.” Ritters’ attorney indicated Ritters were not attempting to limit the Association’s use of that name. However, Danner was not satisfied with the response he received from Farrows’ attorney.

¶23 Nevertheless, Danner did not move to intervene at that point because a hearing on the parties’ cross-motions for summary judgment was scheduled for November 11, 2011. Danner concluded a motion to intervene would likely be unnecessary if the circuit court granted Ritters summary judgment. He therefore advised the Association it could “save ... a bundle of money” by waiting to seek intervention. After the court denied both parties’ summary judgment motions, Danner contacted Ritters’ and Farrows’ attorneys to ask whether they would agree to allow the Association to intervene. Farrows’ attorney refused to agree, and at that point Danner filed a motion for intervention.

¶24 In its oral decision, the circuit court essentially found that the Association had presented reasonable grounds for the delay in filing its motion to intervene. Nonetheless, the court concluded the Association did not act promptly because its motion was filed less than one month before trial. We conclude the court erroneously exercised its discretion in this respect. Having concluded the Association’s grounds for delay were reasonable, the court failed to adequately explain why the Association’s motion was insufficiently prompt, apparently confusing the issue of promptness with prejudice.

¶25 The circuit court did not separately address the promptness of Ritters’ motion for joinder. However, Ritters argue they “moved to require joinder less than a month after the court had questioned why [the Association] and the other unit owners were not part of the lawsuit at the [summary judgment]

hearing.” Ritters assert it was the circuit court’s “query about the fact that [the Association] and the unit holders were not parties” that prompted them to seek joinder. The record supports this assertion. During the summary judgment hearing, Ritters attempted to argue that the Association owned the name “Bibs Resort,” but the circuit court rejected that argument, reasoning the Association was not a party to the case.

¶26 Ritters also argue they had no reason to think joinder of the Association and the other unit owners was necessary until the circuit court enjoined Ritters from using the name “Bibs” and subsequently found them in contempt for using the name “Ritter Cottage Rentals, located at BIBS Resort Condominium.” Ritters suggest the court’s contempt ruling called into question whether the Association and the other owners could use the condominium’s legal name for marketing purposes. We agree with Ritters that, prior to the court’s rulings on the temporary injunction and contempt motion, the necessity of joining the Association and other unit owners was unclear. We therefore conclude Ritters acted reasonably promptly in filing their motion for joinder.

¶27 Regarding the second prong of the timeliness inquiry—prejudice—the circuit court stated allowing intervention or joinder would prejudice the existing parties. However, the court did not cite any specific examples of prejudice that would result. The court simply noted the motions were filed on the eve of trial, and granting intervention or joinder would require the trial to be postponed. The court did not explain how this postponement would prejudice Farrows. It did not suggest, for instance, that postponing the trial would result in witnesses’ memories fading or would render any witness unavailable to testify.

Farrows similarly fail to cite any specific examples of prejudice on appeal.⁴ We therefore conclude the court erroneously exercised its discretion when it found that allowing intervention or joinder would prejudice the existing parties.

¶28 As a result, the circuit court erred by concluding Ritters’ motion for joinder and the Association’s motion to intervene were untimely. We conclude the motions were timely and therefore satisfied the first *Helgeland* factor.

B. Interest sufficiently related to the subject of the action; effect on the movant’s ability to protect its interest

¶29 *Helgeland* next instructs us to consider whether the movant has an interest sufficiently related to the subject of the action, and whether the disposition of the action may impair the movant’s ability to protect its interest. *Helgeland*, 307 Wis. 2d 1, ¶38. Following the parties’ lead, we address these two factors together. “[A] claimed interest does not support intervention if it is only remotely related to the subject of the action.” *Id.*, ¶45. “There must be some sense in which the interest is ‘of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment.’” *Id.* (quoting *City of Madison v. WERC*, 2000 WI 39, ¶11 n.9, 234 Wis. 2d 550, 610 N.W.2d 94).

¶30 We conclude the Association and the individual unit owners have interests sufficiently related to the subject of this action to justify intervention or joinder. Farrows have essentially claimed an exclusive right to use the trade name “Bibs Resort.” During the course of this lawsuit, they obtained an injunction

⁴ Farrows do note that “[a]n out-of-town expert was scheduled to (and did) testify [at trial].” However, they do not suggest this expert would have been unavailable to testify had the trial been rescheduled. Moreover, as Ritters point out, Farrows’ “out-of-town expert” was from Rhinelander, Wisconsin, which is less than one hour from the Vilas County courthouse.

preventing Ritters, or anyone acting on their behalf, from using the name “Bibs.” The circuit court found that Ritters’ use of the phrase “Ritter Cottage Rentals, located at BIBS Resort Condominium” violated the injunction. The Association, however, has an interest in using its legal name—“Bibs Resort Condominium, Inc.”—for business and marketing purposes. The individual unit owners also have an interest in identifying their units, for marketing and other purposes, as “Unit X at Bibs Resort Condominium.” These interests are directly related to the subject matter of Farrows’ lawsuit.

¶31 Further, at the time the circuit court denied the motions for joinder and intervention, it was evident the disposition of this lawsuit could impede the Association and the individual unit owners from protecting their interests. At that time, the temporary injunction barred Ritters or anyone on their behalf from using the name “Bibs,” and the court had concluded a phrase including the words “located at BIBS Resort Condominium” violated the injunction. The Association and unit owners had reason to fear that, if the jury found in Farrows’ favor on the trade name claim, the court would enter a similar permanent injunction, which could impact their right to use the condominium’s name for business and marketing purposes. For instance, the Association argues:

If [the Association] ... chose to act as a rental management agent and wished to market those managed units [using the words “Unit X at Bibs Resort Condominium], it would have every right to do so. If ... Ritters then chose to put their units into the Association’s rental program, the Association would be enjoined from carrying out its function.

We agree with the Association that the temporary injunction and the court’s contempt ruling created a “chilling effect” likely to deter the Association and the

individual unit owners from using the phrase “Bibs Resort Condominium” for business and marketing purposes.

¶32 Farrows argue the disposition of this case has no effect on the Association and the individual unit owners because the circuit court ultimately declined Farrows’ request for a permanent injunction. However, Farrows’ argument assumes that we assess this lawsuit’s effect on the Association and the individual unit owners based on the facts now known to us. We think it is more appropriate to address this issue based on the facts known to the parties and the circuit court at the time the court denied the motions for joinder and intervention. At that point, it was possible the disposition of the lawsuit would impede the Association and the individual owners from protecting their interests in the name “Bibs Resort.”⁵

¶33 Farrows also argue the disposition of this case does not affect the Association and the individual unit owners because “Farrows have never argued that the Association does not have the right to use its name for purposes related to operation of the condominium association.” Farrows note they offered to stipulate that the Association and the individual owners could use the words “Bibs Resort Condominium” on road signs, in real estate transactions, in service contracts, and

⁵ Moreover, had the Association and the individual unit owners been made parties, the result of the trial might have been different. The Association and the individual unit owners could have questioned whether Ritters had the right to sell Farrows the exclusive right to use the trade name “Bibs Resort.” Had they done so, it might have affected the jury’s decision on the trade name claim.

In addition, although the circuit court declined to issue a permanent injunction, the jury found that Farrows’ use of the name “Bibs Resort” was entitled to protection as a trade name. If Farrows later sue the Association or any of the individual owners for trade name infringement, a court could determine the jury’s verdict bars relitigation of that issue, pursuant to the doctrine of issue preclusion.

in other legal documents. They therefore argue the interests of the Association and the individual owners are adequately protected.

¶34 There are two problems with this argument. First, Farrows’ proffered stipulation indicates they believe they have an exclusive right to use the name “Bibs Resort” and can therefore dictate the circumstances in which other entities may use that name. The Association disputes that premise. Second, Farrows’ proffered stipulation does not include the right to use the words “Bibs Resort Condominium” in marketing. Farrows concede they object to the use of the term “Bibs” in advertising for vacation rentals. However, the Association and the individual owners have an interest in being able to use the condominium’s name to market individual units, either for sale or as vacation rentals. Accordingly, the proffered stipulation does not adequately protect their interests.

¶35 For the foregoing reasons, we conclude the motions for joinder and intervention satisfied the second and third *Helgeland* factors.

C. Existing parties’ ability to represent movant’s interest

¶36 The fourth *Helgeland* factor requires us to find that the existing parties do not adequately represent the movant’s interest. *Helgeland*, 307 Wis. 2d 1, ¶38. This requirement is satisfied if the movant shows the existing parties’ representation “may be” inadequate. *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W.2d 301 (Ct. App. 1999). “[T]he burden of making that showing should be treated as minimal.” *Id.* (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). However, “adequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action.” *Helgeland*, 307 Wis. 2d 1, ¶90.

¶37 The Association concedes it shares a “similar desired outcome” with Ritters—that is, “that there not be a finding that ... Farrows['] use of the name ‘Bibs Resort’ constitutes a trade name.” Despite this concession, we reject Farrows’ argument that the Association, the individual owners, and Ritters have the same “ultimate objective.” The trade name dispute between Farrows and Ritters was inextricably linked with their contract dispute. Farrows alleged Ritters sold them the exclusive right to use the trade name “Bibs Resort” and then reneged on that agreement. The Association and the other owners were not parties to the contract between Ritters and Farrows. They have independent rights to the name “Bibs Resort,” and they claim they never agreed Farrows could be sold the exclusive right to use that name. Thus, while Ritters’ main concern in this litigation is to show they *did not* sell Farrows the exclusive right to use the name “Bibs Resort,” the Association and other owners have an interest in showing Ritters *could not* sell Farrows that right. Consequently, although Ritters, the Association, and the other owners have some similar goals in this litigation, their ultimate objectives are not identical.

¶38 Moreover, the record shows Ritters were actually unable to adequately represent the interests of the Association and the other unit owners in this lawsuit. During the summary judgment hearing, Ritters attempted to argue that the Association and other unit owners had a right to use the name “Bibs Resort.” The circuit court rejected that argument, stating, “The condominium units or the condominium, itself, is not ... party to this action.” Thus, when Ritters attempted to represent the interests of the Association and the other unit owners, the court prevented them from doing so. We therefore conclude the Association and Ritters have made the “minimal” showing necessary to satisfy the fourth *Helgeland* factor.

D. Due process and efficiency considerations

¶39 In addition to the four *Helgeland* factors, case law directs us to evaluate a motion to intervene “with an eye toward ‘disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.’” *Wolff*, 229 Wis. 2d at 742-43 (quoting *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 548-49, 334 N.W.2d 252 (1983)). Here, due process and efficiency considerations support our conclusion that the circuit court erred by denying the motions for joinder and intervention.

¶40 As outlined above, the Association and the individual owners have interests in the name “Bibs Resort” that are not identical to Ritters’ interest. This lawsuit may affect their interests, but they were denied the opportunity to appear. One of the hallmarks of procedural due process is the opportunity to be heard. *See Schopper v. Gehring*, 210 Wis. 2d 208, 213-14, 565 N.W.2d 187 (Ct. App. 1997).

¶41 With respect to efficiency, the circuit court’s denial of the motions for joinder and intervention will likely lead to future litigation. The Association and individual owners may be compelled to initiate new lawsuits to clarify their rights to use the name “Bibs Resort.” Alternatively, they may end up defendants in litigation initiated by Farrows. Granting the motions for intervention and joinder would have allowed all interested parties’ rights to be resolved in a single proceeding, which would have been more efficient than requiring multiple proceedings and would have eliminated the potential for inconsistent results.

¶42 Accordingly, based on the four *Helgeland* factors, as well as due process and efficiency considerations, we conclude the circuit court erred by denying Ritters’ motion for joinder and the Association’s motion for intervention. We therefore reverse the judgment in favor of Farrows and the order denying the

motion for intervention, and we remand for further proceedings on Farrows' trade name claim.

II. Attorney fees

¶43 Ritters also argue the circuit court erred by awarding Farrows attorney fees on their trade name claim.⁶ Whether attorney fees are recoverable is a question of law that we review independently. *Marquardt v. Milwaukee Cnty.*, 2002 WI App 12, ¶7, 249 Wis. 2d 780, 639 N.W.2d 762 (WI App 2001).

¶44 The circuit court determined Farrows were entitled to attorney fees under WIS. STAT. § 132.033(2)(d).⁷ Ritters argue the court erred because attorney fees may be awarded under § 132.033(2)(d) only if a plaintiff proves infringement of a registered mark, pursuant to § 132.033(1). Ritters argue no statutory claim for infringement of a registered mark was submitted to the jury, and the jury merely found common law trade name infringement. Farrows do not dispute that attorney fees under § 132.033(2)(d) are limited to statutory claims for infringement of registered marks. However, Farrows argue both common law and statutory trademark infringement claims were presented to the jury in a single question on the special verdict, and the jury effectively found both common law and statutory infringement.

⁶ Although we reverse and remand for further proceedings on Farrows' trade name claim, we choose to address Ritters' argument that the circuit court improperly awarded attorney fees because the issue may arise on remand.

⁷ In the circuit court, Farrows also argued they were entitled to attorney fees under the common law exception to the American Rule set forth in *Weinhagen v. Hayes*, 179 Wis. 62, 65, 190 N.W. 1002 (1922). The circuit court rejected that argument, and Farrows do not renew it on appeal.

¶45 We agree with Ritters that the circuit court erred by awarding Farrows attorney fees under WIS. STAT. § 132.033(2)(d) because the jury did not find that Ritters infringed on a registered mark in violation of § 132.033(1). Common law trade name infringement and statutory infringement of a registered mark are distinct claims with different elements. As we explain below, although Farrows pled claims for both statutory trademark infringement and common law trade name infringement, only the common law claim was submitted to the jury.

¶46 To establish common law trade name infringement, a plaintiff must prove two elements. *Madison Reprographics, Inc. v. Cook's Reprographics, Inc.*, 203 Wis. 2d 226, 234, 552 N.W.2d 440 (Ct. App. 1996). First, the plaintiff must show that a designation meets the definition of a trade name, which is “a word or other designation ... that is used in a manner that identifies [a] business or enterprise and distinguishes it from the business or enterprise of others.” *Id.* Second, the plaintiff must show that the defendant’s use of a similar designation is likely to cause confusion. *Id.*

¶47 In contrast, WIS. STAT. § 132.033(1) provides that every person using a registered mark may “enjoin the manufacture, use, display or sale of any counterfeit mark identical to or substantially identical to that mark.”⁸ Thus, to establish statutory trademark infringement under § 132.033(1), a plaintiff must prove: (1) that it is the owner of a registered mark; and (2) that the defendant manufactured, used, displayed, or sold a “counterfeit mark” identical to or

⁸ WISCONSIN STAT. § 132.033(2) specifies additional remedies available for a violation of § 132.033(1), including damages and attorney fees. *Madison Reprographics, Inc. v. Cook's Reprographics, Inc.*, 203 Wis. 2d 226, 247, 552 N.W.2d 440 (Ct. App. 1996).

substantially identical to the plaintiff's registered mark.⁹ "[I]dentical to or substantially identical to" means "that the challenged designation must be an exact copy of the registered mark or substantially indistinguishable from it." *Madison Reprographics*, 203 Wis. 2d at 249. "This requires a higher degree of similarity between the registered mark and the challenged mark than is required for an ordinary trademark infringement claim." *Id.*

¶48 The special verdict submitted to the jury contained a single section addressing the parties' rights to the name "Bibs Resort." That section, entitled "Trade Name Infringement," consisted of three questions. Question 4A asked, "Did Farrows establish that [their] use of the name 'Bibs Resort' is a trade name?" The jury instructions stated a trade name "is a word or designation, or a combination of words or designations, that is used in a manner that identifies a business and distinguishes it from the business or enterprise of others." If the jury answered yes to question 4A, it was instructed to answer question 4B, which asked, "Does Ritters' use of the name 'Bibs Cottages' or 'Cottages at Bibs Resort' infringe Farrows' trade name?" The jury instructions stated that, to find infringement, the jury had to conclude Ritters' "use of a similar designation will cause a likelihood of confusion." The instructions further clarified, "To constitute an infringement, it is not necessary that every word of the trade name be appropriated. It is sufficient that enough be taken to deceive the public." Finally, if the jury answered yes to question 4B, it was instructed to answer question 4C,

⁹ The term "counterfeit mark" is defined as "a spurious mark that is identical to or substantially identical to a genuine mark and that is used or intended to be used on or in connection with goods or services for which the genuine mark is registered and in use." WIS. STAT. § 132.001(1).

which asked, “Was Ritters’ infringement a cause of damages to ... Farrows?” The jury responded affirmatively to all three of these questions.

¶49 The jury instructions and special verdict clearly track the elements of a common law trade name infringement claim. *See id.* at 234. The jury was not asked to find, and therefore did not find, the elements of a statutory trademark infringement claim under WIS. STAT. § 132.033(1). Specifically, the jury was not asked to find whether Farrows were the owners of a registered mark, or whether Ritters used a mark that was either an “exact copy” of Farrows’ mark or “substantially indistinguishable from it.” *See Madison Reprographics*, 203 Wis. 2d at 249. In fact, the jury was specifically instructed the marks did not need to be identical for Ritters’ use to constitute infringement. We therefore agree with Ritters that the jury did not find Ritters infringed on a registered trademark in violation of § 132.033(1). Consequently, Farrows were not entitled to an award of attorney fees under WIS. STAT. § 132.033(2)(d).

¶50 Farrows assert Ritters agreed to combine the statutory trademark and common law trade name claims into a single claim for purposes of trial. We do not believe the record clearly shows an agreement to combine the claims. Moreover, given that the two claims require proof of different elements, trying them as a single claim would have been impossible.

¶51 Farrows also observe that, in its decision awarding Farrows attorney fees, the circuit court stated, “[T]he evidence was sufficient to conclude that the trade name of ‘Bibs’ was properly registered.” As evidence of registration, Farrows point to an “Application for Registration of Marks” that Farrows filed

with the Wisconsin secretary of state on February 17, 2010.¹⁰ Farrows argue this document indisputably shows Farrows registered the name “Bibs Resort” as a trademark. In response, Ritters assert the February 17 application merely shows Farrows attempted to register the name “Bibs Resort,” and it does not prove a registration was actually granted.

¶52 We need not decide the legal effect of Farrows’ February 17 application to register “Bibs Resort” as a trademark.¹¹ Even assuming the application proves that Farrows registered “Bibs Resort” as a trademark, the application was not entered into evidence during trial. Instead, it was submitted to the circuit court by Ritters on summary judgment. Thus, the jury never saw the February 17 application. Accordingly, the application could not have provided a basis for the jury to conclude Farrows registered “Bibs Resort” as a trademark. Moreover, even if Farrows did prove ownership of a registered trademark, the jury did not find the second element of statutory trademark infringement—that Ritters manufactured, used, displayed, or sold a “counterfeit mark” identical to or

¹⁰ Under the 2009-10 version of the Wisconsin Statutes, applications for trademark registration were filed with the secretary of state. *See* WIS. STAT. § 132.01(1) (2009-10). Applications are now filed with the Department of Financial Institutions. *See* WIS. STAT. §§ 132.001(1m), 132.01(1).

¹¹ We do note, however, that WIS. STAT. § 132.031 provides:

The department shall deliver to the person ... causing to be filed any such mark ... as many duly attested certificates of the registration or renewal of the same as may be desired. Any such certificate shall, in all suits and prosecutions arising out of or depending upon any rights claimed under such mark, be prima facie evidence of the adoption thereof and of the facts prerequisite to registrations thereof as required by s. 132.01.

Farrows do not assert that the record contains a certificate of registration for the name “Bibs Resort.”

substantially identical to Farrows’ registered mark. *See Madison Reprographics*, 203 Wis. 2d at 249. We therefore reject Farrows’ argument that the February 17 application proves the jury concluded Ritters engaged in statutory trademark infringement.

¶53 Finally, Farrows argue we should reject Ritters’ challenge to the attorney fee award because the appellate record does not contain a transcript of the hearing on Farrows’ motion for attorney fees. Farrows assert that Ritters, as the appellants, were responsible for providing a record sufficient to review the issues they raised on appeal. *See Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶35, 298 Wis. 2d 468, 727 N.W.2d 546 (WI App 2006). Farrows note that, in the absence of a transcript, we generally presume the record supports every fact essential to sustain the circuit court’s decision. *See id.*

¶54 The rule that we presume missing materials support the circuit court’s decision is typically applied when we review discretionary decisions or factual findings. *See Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 634, 641, 273 N.W.2d 233 (1979); *Butcher*, 298 Wis. 2d 468, ¶35; *J.F. Ahern Co. v. Wisconsin State Bldg. Comm’n*, 114 Wis. 2d 69, 85, 336 N.W.2d 679 (Ct. App. 1983). In contrast, whether Farrows could recover attorney fees is a question of law subject to independent review. Even in the absence of a transcript, a court may “consider errors of law revealed in a trial court memorandum[.]” *Austin*, 86 Wis. 2d at 641. In this case, we can determine as a matter of law based on the record before us that the circuit court erred by awarding Farrows attorney fees under WIS. STAT. § 132.033(2)(d). Under the circumstances, we have all the information we need to review the circuit court’s decision. We therefore reject Farrows’ argument that Ritters’ failure to provide a transcript of the attorney fee hearing is fatal to their appeal of the attorney fee award.

CONCLUSION

¶55 In summary, we conclude the circuit court erred by denying Ritters' motion for joinder of the Association and the individual condominium unit owners, and by denying the Association's motion to intervene. We also conclude the court erred by awarding Farrows attorney fees on their trade name claim. As a result, we reverse the judgment in favor of Farrows and the order denying the Association's motion to intervene, and we remand for further proceedings on the trade name claim.

By the Court.—Judgment and order reversed and cause remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

